SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

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CHAMPLIN-SHEALY COMPANY, CHICAGO

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Respondent's brief requires no detailed answer.

Counsel take the word "liability" out of its context; select one of the many meanings of the word from Webster's Dictionary; conclude that the word, as used in Section 5, relates only to liability to respond in damages, as provided in Section 1 and seek to remove the contracts dealing with rights under Section 6 from the protecting coverage of Section 5 by applying the well-established principle that the requirement of the general venue statute that a defendant be sued in a particular place grants a privilege which may be waived. When Section 6 was enacted giving the plaintiff the choice of any one of three places in which to bring his suit, venue was no longer a privilege to be

insisted upon or waived, but a liability within the meaning of Section 5.

The principle, of course, does not apply here. Respondent's line of reasoning is climaxed by the assertion (Page 11):

> It is significant that Petitioner has not produced one single decision of this Court which holds that after a cause of action has come into being the parties may not waive their statutory venue privileges.

Since counsel are really talking about a case that might arise under the general venue statutes where a plaintiff is required to bring his suit in a particular place, this assertion seems appropriate and if it is a challenge calling for such a decision, we must admit failure to produce such a decision.

But, if counsel are arguing the case at bar, arising under a law which gives to plaintiff a choice of places in which to bring his suit, we believe the challenge is met by the decisions in the *Akerly* and *Krenger* cases and the case of *Duncan* v. *Thompson* which we do cite and upon which the two United States Courts of Appeals relied.

We are not here seeking to discover that often obscure and nebulous thing called Congressional intention. We know what Congress did and why the Federal Employers' Liability Act in its present form was enacted into law. It is only in the light of what Congress did that the words, in Section 5 with which we are here concerned including the word "liability," may be given a meaning.

If all that Congress did was to create liability or merely to change the liability of the existing common law right of action into the liability of a statutory right of action, without more, there would be no problem. But that is not all that Congress did. The very purpose of the Act was, not to create liability or merely make liability a statutory thing,

but, as was said in the debate in Congress on the 1910 Amendment:

> "The passage of the original Act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as Congressional power can extend, these rules of the common law which the President, in a speech at Chicago, characterized as unjust."

In the case of *Wilkerson* v. *McCarthy*, 69 U. S. 413, recently decided by this Court, Mr. Justice Douglas, in a concurring opinion, said (Page 420):

> "While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases.
>
> "The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'"

This language is in harmony with the theory of the Petitioner urged in this case all the way from the Michigan Courts to this Court. The primary purpose was to remove these injustices and to encourage the carriers to provide safe equipment and safe conditions of work for their employees.

The words, "any liability created by this chapter," as used in Section 5, have no meaning at all, unless they relate to every provision of the Act from Section 1, which abolished the fellow-servant rule, to Section 10, which imposes a penalty for violation of any of its provisions. All of these provisions including Sections 5 and 6 were enacted for the same purpose—to remove injustices that had developed in connection with the employees' right of action for injuries and death and to promote safety for the men. If Section 5 does not relate to all of these provisions, then the carrier may by these contracts with necessitous employees, completely nullify every provision of the Act and make of the entire law a dead letter on the statute books of the Nation.

Duncan v. *Thompson*, we believe, answers every question that has been raised in this case. The Supreme Court of Michigan does not even mention it. Respondent merely mentions it in its brief and does not even try to explain it away except by quoting from *Clark* v. *Loudon*, 48 F. Supp. 261, 265. Both the Michigan Court and Respondent ignore Petitioner's theory of the case based on what Congress really did and rely upon selected definitions of the one word "liability" and upon many inapposite authorities.

Aside from this, Respondent in its Brief:

1. (Page 5) In effect misquotes Section 1 of the Act. "Negligence *of any of the officers, agents or employees* of the carrier" and not "negligence * * * of the carrier" is what gives rise to liability. The words in italics omitted by Respondent, abolish the fellow-servant rule and constitute the expression of the prime purpose of the Section.

2. (Page 8) Sets up excerpts from the Congressional Record of the debate on the venue provision of the Act originally proposed in the House but which was rejected in the Senate for a substitute provision in the language of the present Section 6. It was this final provision which, as Senator Borah stated in the Senate:

"Enabled the plaintiff to find the corporation at any point or place or State where it is actually carrying on its business, and there lodge his action, if he chooses to do so."[1]

3. (Page 12) Quotes and relies upon 17 C.J.S. Contracts, Sec. 229, Page 605, stating the rule prior to *Duncan* v. *Thompson* that contracts affecting Venue prior to the accrual of a cause of action are invalid but that the rule does not apply to contracts made after the cause of action has accrued.

4. (Page 17) Puts these contracts made with necessitous employees by the claim agents of the carrier on a par with an order of a District Court, after hearing, transferring a case under 28 U.S.C. Sec. 1404 (a).

5. (Page 28) Cites a Washington State Court case to the effect that a State Court is not bound by a decision of a United States Court of Appeals in a Circuit embracing the State on a Federal question growing out of a Federal Statute when numerous cases decided by the Michigan Supreme Court holding that it was so bound were called to the Court's attention in the Application for Rehearing, along with the *Akerly* case (R. 43-44).

We submit that the rule of the *Duncan* case and of the State and Federal Court decisions following it, should be reaffirmed in this case.

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[1] 45 Cong. Rec. Pt. 4, p. 4043.

Respectfully submitted,

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